

Impact case study (REF3)

Institution: University of Essex		
Unit of Assessment: 30 - Philosophy		
Title of case study: Influencing Policy to Foster Autonomy and Respect for Human Rights in Care Contexts		
Period when the underpinning research was undertaken: 2009-2019		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Wayne Martin	Professor	2005 - present
Fabian Freyenhagen	Professor	2008 - present
Timo Jütten	Professor	2011 - present
Matthew Burch	Lecturer	2013 - present
Period when the claimed impact occurred: May 2014 – Dec 2020		
Is this case study continued from a case study submitted in 2014? No		
1. Summary of the impact		
<p>Research undertaken by the Essex Autonomy Project (EAP) has influenced public policy and professional practice, both domestically and internationally. It has informed the ongoing global reform of mental health and mental capacity legislation and the effort to embed respect for patient autonomy and human rights within care practices. In particular, EAP research has (1) helped shape government initiatives to reform legislation in compliance with the United Nations Convention on the Rights of Persons with Disabilities (CRPD), and (2) contributed to the development of professional practices that fulfil a key, autonomy-enhancing principle of the Mental Capacity Act (MCA).</p>		
2. Underpinning research		
<p>For the past ten years, researchers associated with the Essex Autonomy Project (EAP) have been investigating the ideal of autonomy (self-determination) as it applies in the context of care: health care, social care, psychiatric care, eldercare, etc.</p> <p>Key research findings from the project have come in two areas:</p> <p>A) <i>Mental Capacity and Decision-Making Ability</i>: EAP researchers have conducted pioneering research on the concept of decision-making capacity (or 'mental capacity'), which functions in the law as a condition on the validity of consent to treatment, as a critical determinant of a person's right to refuse unwanted care-interventions, and more broadly as a key factor in determining a person's standing before the law. EAP research outputs have clarified the concept of decision-making capacity, identified the phenomenon of "distributed capacity" [R1], analysed the conception of autonomy that is reflected in capacity legislation [R2-R4], and developed resources and techniques from philosophical phenomenology in order to identify specific forms of decision-making impairment in persons living with particular mental disorders (see R5 for the most recent in a series of research articles reporting on this line of research.) This research began in the last REF cycle but has produced a steady stream of new research findings and new impact in the current REF period.</p> <p>B) <i>CRPD-Compliance</i>: Near the end of the last REF cycle, the EAP research team organised and hosted the first ever public debate (held in the Senate House in London) on the question of whether the Mental Capacity Act (MCA) complies with the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The results of that first debate were inconclusive, and it was clear to all involved that further research was required. In the current REF cycle, the EAP research team has become a global leader in analysing the requirements of CRPD-compliance as they apply to mental capacity and mental health legislation. In a series of position papers [R6],</p>		

briefings [R7], submissions to governmental and international bodies [R8], and research articles [R9], the EAP team has developed a systematic interpretation of CRPD Art 12 [R6, R8]; analysed the notions of autonomy and non-discrimination that figure in the CRPD [R6]; critically assessed the case for abolishing coercive care [R9]; established that the Mental Capacity Act and related legislation are remediablely non-compliant with the CRPD [R6, R7]; and showed that the CRPD-compliance does not require the abolition of “substitute decision-making” [R8].

These two lines of ongoing EAP research intersect with one another in connection with MCA sec. 1(3), which states that “A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.” EAP research has demonstrated that MCA sec. 1(3) is critical to support for the autonomy of care-recipients, integral to the normative structure of the MCA, vital to the goal of achieving full CRPD-compliance, but also poorly implemented in practice [R8].

3. References to the research

- R1.** Martin, W and Hickerson, R (2013): “Mental Capacity and the Applied Phenomenology of Judgement,” *Phenomenology and the Cognitive Sciences* 12:1, 195-214. <https://doi.org/10.1007/s11097-011-9242-y>.
- R2.** Martin, W (2011): “Antinomies of Autonomy: German Idealism and English Mental Health Law”; *International Yearbook or German Idealism / Internationales Jahrbuch des deutschen Idealismus* 9, 191-213. <https://doi.org/10.1515/9783110283747.191>.
- R3.** Freyenhagen, F and O’Shea, T (2013): “Hidden Substance: Mental Disorder as a Challenge to Normatively Neutral Accounts of Autonomy” *International Journal of Law in Context*, 9(1): 53-70. <http://doi.org/10.1017/S1744552312000481>.
- R4.** Burch M (2017): “Autonomy, Respect and the Rights of Persons with Disabilities” in *Journal of Applied Philosophy* 34:3, 389-402. <https://doi.org/10.1111/japp.12248>
- R5.** Martin, W, Owen G, and Gergel, T (2019): “Manic Temporality,” *Philosophical Psychology* 32:1, 72-97. <https://doi.org/10.1080/09515089.2018.1502873>
- R6.** Martin, W., Michalowski, S., Jütten, T and Burch, M (2014): *Achieving CRPD Compliance: A Report to the UK Ministry of Justice*. <https://autonomy.essex.ac.uk/resources/achieving-crpd-compliance>.
- R7.** Martin, W (2014): “Consensus Emerges in Consultation Roundtable: The MCA is Not Compliant with the CRPD,” *Mental Capacity Law Newsletter* 49. <http://repository.essex.ac.uk/14227/1/UNCRPD-MCA-Compatibility-Discussion-Paper-Final-5-8-14.pdf>.
- R8.** Martin, W., Michalowski, S., Stavert, J, Ward, A, Ruck Keene, A, Caughey, C, Hempsey, A, McGregor, R (2016): *The Essex Autonomy Project Three Jurisdictions Report*; <https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-3J-Final-Report-2016.pdf>
- R9.** Martin, W and Gurbai, S (2019): “Surveying the Geneva Impasse: Human Rights and Coercive Care”; *International Journal of Law and Psychiatry* 64:3 117-128. <https://doi.org/10.1016/j.ijlp.2019.03.001>
- G1** Martin, W., Freyenhagen, F. Deciding for Oneself: Autonomous Judgement in History, Theory and Practice, AHRC, 1st April 2010 – 30th March 2013. £392,930
- G2** Martin W., Freyenhagen, F. Contested Autonomy in Public Policy and Professional Practice. AHRC. 1st November 2010 – 30th March 2013. £337,315
- G3** Martin, W., Jütten, T. Achieving UNCRPD Compliance. AHRC Follow-On Funding. 1st February 2014 – 31st July 2014. £23,219
- G4** Martin, W. et al. UK Preparation for the UN CRPD Engagement Process: A Three-Jurisdiction Approach. AHRC Follow-On Funding. 1st July 2015 – 30th May 2016. £63,905.33

G5 Martin, W., Burch, M., et al. Mental Health and Justice. Wellcome Trust. 9th January 2017 – 8th January 2022. (Essex Portion Only): £380,475

4. Details of the impact

Mental health and mental capacity legislation has a profound impact on the lives of some of the most vulnerable persons in society. In 2019, in England and Wales, more than 200,000 authorisations for deprivation of liberty were issued under the so-called “Deprivation of Liberty Safeguards” (DoLS); more than 50,000 individuals were detained (i.e., ‘sectioned’) under the Mental Health Act. This group of a quarter of million people in fact represents the tip of a much larger iceberg – persons for whom the provision of care (health care, social care, psychiatric care, eldercare, etc.) impacts directly upon autonomy and human rights.

The current REF period has been a period of intense public policy activity in the areas of mental capacity and mental health legislation, both domestically and internationally. Partly this has been occasioned by increased case-loads and increased costs, but a major factor has been new legal approaches, including landmark court judgements and developments in international law, particularly the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Research undertaken by the Essex Autonomy Project has played a significant role in informing and shaping public policy and practice in these areas.

Informing Implementation of the Mental Capacity Act

In England and Wales, EAP research has informed the application and adjudication of the Mental Capacity Act (MCA). The MCA provides a statutory framework for making “best-interests decisions” for those who lack the mental capacity to make a decision for themselves. Examples of EAP impact include:

- An EAP research article [R7] was introduced in evidence in an MCA case decided in the UK Supreme Court (*N v ACCG* [2017] UKSC 22) [S1].
- EAP analysis of “distributed capacity” [R1], of impairments of decision-making ability under psychiatric disorder (R5 is one example from a series), and of implementation of MCA sec 1.3 [R8] was used, *inter alia*:
 - to provide a commissioned CPD training module for judges, delivered through the Judicial College (part of the Courts and Tribunal Service for England and Wales). In 2019, the EAP module was delivered to ~120 judges [S2].
 - to provide commissioned EAP workforce training to legal professionals through the Court of Practice Practitioners Association (CoPPA), a professional organisation for persons working in and with the Court of Protection [S3].
 - to provide commissioned EAP workforce training to over 2000 Best Interests Assessors, §12 doctors, Approved Mental Health Professionals and Independent Mental Capacity Advocates in (inter alia) the West Midlands, Hertfordshire, Gloucester, Bristol, Northumberland, Sussex, Greater London, and Essex. Delegate feedback includes statements such as: “An excellent presentation. Brilliant delivery and informative content. A really refreshing slant on issues of capacity. This will definitely change my practice.” [S4].

Efforts to Achieve CRPD Compliance

The CRPD was adopted by the UN General Assembly in 2006 and is one of the most widely ratified of all the UN human rights treaties. But the question of how state parties should comply with the CRPD in the provision and regulation of care has been a matter of controversy. Following the historic EAP debate at Senate House in 2013, the EAP research team has played a key role in supporting government bodies, non-governmental organisations and activists in developing an interpretation of the requirements of CRPD compliance in mental capacity and mental health law. Examples of EAP impact include:

- In 2014, the EAP research team was invited by the Ministry of Justice (MoJ) to organise and chair a series of three multidisciplinary roundtable meetings in order to provide research support to MoJ in assessing the compliance of the MCA with the CRPD. The

roundtables were held in the MoJ's Westminster headquarters and culminated in a widely circulated EAP position paper on this topic [R6], which was submitted to MoJ in 2014. MoJ never made their formal legal opinion public, but the principal finding of the EAP report (that the MCA is "remediably noncompliant" with the CRPD) was publicly endorsed by HHJ Denzil Lush, who was then the Senior Judge of the Court of Protection. Judge Lush wrote: "*I agree with the Essex Autonomy Project's report that the UN Committee on the Rights of Persons with Disabilities is wrong in asserting that compliance with the UNCRPD requires the abolition of substitute decision making and the best-interests decision-making framework.*" [S5].

- In 2015, the Law Commission undertook a review of the MCA and the associated Deprivation of Liberty Safeguards. The Law Commission cited the EAP report on MCA compliance in its final report [S6, Appendix B, n.22]; one legal consultant to the Law Commission reported that the EAP report to MoJ was "*of considerable assistance to the Law Commission in framing their consideration of the demands of the CRPD in the context of the Mental Capacity and Deprivation project*" [S1].
- Following the 2017 General Election, Prime Minister Theresa May commissioned an independent review of the Mental Health Act. An EAP analysis of coercive care and the UK's treaty-obligations under UN-level human rights conventions [R9] informed the work of the review panel and was cited in its final report, which stated: "*The differing views of relevant UN bodies as to involuntary detention and treatment are usefully summarised in a detailed document prepared by ... the Essex Autonomy Project, from which this [Annex], in part, draws.*" [S7].
- In Scotland, both the Mental Welfare Commission for Scotland and the Law Society of Scotland recommended to Scottish Government that its review of Scottish mental health and mental capacity legislation (aka 'The Scott Review,' which is currently in progress) take into account EAP proposals for achieving CRPD compliance [S8, p 6, Recommendation 5; S9].
- In Northern Ireland, the EAP Director, Wayne Martin, was invited to give testimony before an ad hoc Committee of the National Assembly regarding respect for CRPD rights in the Mental Capacity Bill (Northern Ireland), which has since become law. Martin's evidence was described by one participant in the process as being of '*signal importance*' in making clear to the Assembly Members the significance of weight to be placed upon the wishes and feelings of the relevant person for purposes of CRPD compliance [S1].
- Outside the UK, the EAP analysis of CRPD Art 12 [R2, R4], together with EAP case study material, has been used by national human rights bodies, law commissions, civil servants and activists in (inter alia) Northern Ireland, the Republic of Ireland, Norway, Bulgaria, Canada, Japan, Peru and the Council of Europe. For example:
 - In the Republic of Ireland, the EAP reports on CRPD compliance were used by a team of civil servants who wrote the Codes of Practice for the Supported Decision-Making (Capacity) Act [S10].
 - In Canada, EAP analysis of CRPD non-discrimination requirements [R2] was used by NGOs reporting to Canadian and provincial government bodies "*to demonstrate the ways in which Canada's legal capacity laws are inconsistent with the CRPD and to illustrate a frame of analysis to promote CRPD compliance*". [S11].
 - In Peru, the Special Commission for the Reform of the Civil Code "*found the publications of the Essex Autonomy Project highly useful.*" EAP case study material "*worked as an 'acid test'*" in deliberations over Bill 872/2016 in the Peruvian Congress. After passage of the Bill, the EAP *Three Jurisdictions Report* [R8] was an "*outstanding resource*" in "*train[ing] judges to recognise the legal capacity of persons with disabilities in Peru.*" [S12].

The foregoing are only illustrative examples of EAP impacts. As an indication of further influence beyond that documented here, we note that delegates at the annual EAP Summer School have

included: a Member of Parliament; civil servants from the Republic of Ireland; researchers from Japan, the Netherlands, Sweden, Germany and Peru; barristers who regularly plead in the UK Supreme Court; as well as numerous social workers and mental health professionals who use the EAP Summer School as an opportunity to ensure that their practice is informed by EAP research findings. One delegate noted '*Significant policy decisions in our jurisdiction were swayed by discussions and considerations from these [summer school] sessions [S9]*'. In March, 2015, the EAP team was invited to present its research findings regarding CRPD Art 12 and mental capacity legislation at a dedicated one-hour session of the United Nations Committee on the Rights of Persons with Disability.

5. Sources to corroborate the impact

Evidence of Informing the Implementation of the Mental Capacity Act:

- S1.** Testimonial Letter, Alex Ruck Keene, Barrister, Legal Counsel to the Independent Review of the Mental Health Act.
- S2.** *Court of Protection Continuation Programme 2019*; Courts and Tribunals Service, Ministry of Justice.
- S3.** PDF of two CoPPA Conference programmes (2015, 2018)
CoPPA is a multi-disciplinary organisation whose aims are to consolidate and develop good practice in the Court of Protection and in the implementation of the Mental Capacity Act 2005 through education and training. <https://www.coppagroup.org/>
- S4.** Delegate Feedback, CPD Training Day on Mental Capacity (Oct., 2019), Sussex Partnership NHS Foundation Trust.

Evidence of Efforts to Achieve CRPD Compliance:

- S5.** Lush, D, "The Academy of European Law's conference on the rights of persons with disabilities." *Elder Law Journal* 5:1 (2015), 38-44.
- S6.** The Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Commission Report 372; Crown Copyright, 2017).
- S7.** *Modernising the Mental Health Act: Increasing Choice, Reducing Compulsion ('The Wessely Review')* [Report of the Independent Review of the Mental Health Act] (Crown Copyright, 2018).
- S8.** *Scotland's Mental Health and Capacity Law: The Case for Reform*; The Mental Welfare Commission for Scotland (2017).
- S9.** Submission of the Law Society of Scotland to Scottish Government Consultation on Reform of the Adults with Incapacity (Scotland) Act; https://consult.gov.scot/health-and-social-care/adults-with-incapacity-reform/consultation/view_respondent?_b_index=180&uuld=546025810
- S10.** Testimonial Letter, Caoimhe Gleeson, Health Service Executive, Republic of Ireland.
- S11.** Testimonial Letter, Lana Kerzner, human rights lawyer and disability activist, Canada.
- S12.** Testimonial Letter, Renata Bregaglio Lazarte, Former Member of the Law Reform Commission of Peru.